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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Petition for Declaratory Ruling  
Concerning Section 312(a)(7)  
of the Communications Act

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MM Docket No. 92-254

JOINT COMMENTS OF ACTION FOR CHILDREN'S TELEVISION,  
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS,  
CAPITAL CITIES/ABC, INC., FOX TELEVISION STATIONS, INC.,  
GREATER MEDIA, INC., INFINITY BROADCASTING CORPORATION,  
NATIONAL ASSOCIATION OF BROADCASTERS,  
NATIONAL BROADCASTING COMPANY, NATIONAL PUBLIC RADIO,  
PEOPLE FOR THE AMERICAN WAY, POST-NEWSWEEK STATIONS, INC.,  
PUBLIC BROADCASTING SERVICE,  
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION,  
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,  
AND SOCIETY OF PROFESSIONAL JOURNALISTS

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January 22, 1993

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Petition for Declaratory Ruling ) MM Docket No. 92-254  
Concerning Section 312(a)(7) )  
of the Communications Act )  
  
To: The Commission

**JOINT COMMENTS OF ACTION FOR CHILDREN'S TELEVISION, ET AL.**

INTRODUCTION

These Joint Comments are submitted by a group of commercial broadcasters, public broadcasters and organizations representing broadcasters, journalists and viewers.<sup>1</sup> These parties recently filed comments in In re Enforcement of Prohibitions Against Broadcast Indecency, GC Docket No. 92-223. Most of these parties also were petitioners in Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"), cert. denied, 112 S. Ct. 1282 (1992), and Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I").

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<sup>1</sup> These parties are Action for Children's Television, Association of Independent Television Stations, Capital Cities/ABC, Inc., Fox Television Stations, Inc., Greater Media, Inc., Infinity Broadcasting Corporation, National Association of Broadcasters, National Broadcasting Company, National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio Television News Directors Association, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists.

The Commission has requested comments in this proceeding with respect to the following questions:

[W]hat, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent?

[W]hether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children?

Request for Comments at 2. These comments address only the first of these issues.

This proceeding arose out of an earlier request for a declaratory ruling by the law firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer") on the question whether broadcasters would violate the "reasonable access" provision of Section 312(a)(7) or the "no censorship" provision of Section 315(a) if they were to schedule political candidate advertisements that "present graphic depictions of dead or aborted and bloodied fetuses or fetal tissue" during hours when fewer children are in the audience. See Request for Comments at 1. The proceeding was also intended to address the issues presented by a congressional candidate's challenge to an Atlanta television station's refusal on indecency grounds to present his 30-minute political advertisement on abortion outside the "safe harbor" period. Letter Ruling (Daniel Becker), 7 FCCR 7282 (1992).<sup>2</sup>

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<sup>2</sup> An informal staff opinion has indicated that the indecency prohibition contained in 18 U.S.C. § 1464 may be viewed as an  
(continued...)

These parties unanimously oppose the imposition of any new rule or standard in this proceeding that would expand the existing definition of "indecent." These parties have different views, however, as to whether broadcasters should be accorded editorial discretion under Sections 312(a)(7) and 315(a) with respect to the scheduling of graphic political advertisements. In this regard, we reiterate a point that we have emphasized since the Commission began its expanded indecency enforcement in 1987: Broadcasters know their audiences and appropriately do not wish to offend them and, accordingly, the Commission should defer to broadcasters' reasonable good-faith judgments as to whether material is or is not "indecent" or otherwise appropriate for their audiences. No basis exists to limit this discretion to any particular area of indecency enforcement.

The Court of Appeals for the District of Columbia Circuit has recognized that "vagueness is inherent" in the Commission's indecency definition. ACT I, 852 F.2d at 1344. And these parties have repeatedly expressed their concern that the Commission's definition is already so broad as to encompass protected speech having substantial serious merit. Whether or not any graphic advertisements showing abortions or aborted fetuses could satisfy its existing definition of indecency, the Commission should not use this proceeding to expand that already

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<sup>2</sup>(...continued)  
exception to the no-censorship provision of Section 315. Letter from Chairman Mark Fowler to Hon. Thomas A. Luken (dated Jan. 19, 1984).

vague and overbroad definition. Any definition of indecency that would be broad enough to encompass all of these advertisements could also threaten to encompass news, informational and serious dramatic programming on a variety of topics.

#### DISCUSSION

No topic has been more hotly debated in recent American political history than has abortion rights. A number of candidates for federal office in the past election, as in earlier elections, made abortion rights a principal issue in their campaigns. The issue has also generated intense expressive activity by individual citizens.

The political debate over abortion rights, as well as the underlying legal, medical, emotional and moral issues relating to abortion, has been a frequent subject of television and radio programs. At the same time, political candidates and advocacy groups have presented television and radio advertisements to advance their positions on abortion. These programs and advertisements have dealt in varying degrees of specificity with the actual medical procedures involved in abortion.

It now has been suggested that political advertisements containing graphic depictions of abortion be classified as "indecent" and channeled to the period between midnight and 6 a.m. But even the inherently vague and overbroad terms of the Commission's existing definition of indecency, see ACT I, 852 F.2d at 1344, cannot reasonably be construed to encompass all



graphic depictions related to abortion. To expand the indecency definition to cover all such material could affect a wide array of news and entertainment programming that is likewise protected by the First Amendment.

It is clear that all depictions of the abortion process could not possibly be classified as "indecent" under the Commission's current definition. In the first place, the Commission's indecency definition applies only to depictions or descriptions of "sexual or excretory activities or organs." Abortion is a medical procedure, not a "sexual or excretory activity." Nor do depictions or descriptions of the abortion process necessarily include "sexual or excretory . . . organs."

Moreover, even if material meets the threshold requirement of depicting or describing "sexual or excretory activities or organs," the indecency definition is satisfied only if those depictions or descriptions are "patently offensive as measured by contemporary community standards for the broadcast medium." The contours of the "patently offensive" requirement are far from clear. However, broadcasters have long understood that depictions or descriptions of sexual or excretory organs are clearly permissible in certain contexts. Indeed, the Commission itself has rejected indecency complaints against material presented in a serious manner, as in news and public affairs programs. See, e.g., Letter Ruling (Peter Branton), 6 FCCR 610 (1991) (use of sexual expletive in radio news program); Memorandum Opinion (KING-TV), 5 FCCR 2971 (1990) (television

documentary that included "sex organ models" and "candid discussion of sexual topics"). The Commission has also been more reluctant to regulate such material when, as in the case of political advertisements, it is not presented in a "titillating" or "pandering" manner. See, e.g., Letter Ruling (Peter Branton), 6 FCCR 610.

We note that the advertisements at issue in this proceeding often are objectionable to viewers and broadcasters not because they may (but not always do) depict sexual or excretory organs but because they graphically depict what purports to be real blood, real dismembered body parts, real infliction of pain, and real termination of actual or potential life. These advertisements are unpleasant to watch for the same reasons as are any other graphic and bloody depictions of the infliction of pain or death -- e.g., the footage of the assassination of President Kennedy included in the recent film JFK or the execution of a Vietnamese prisoner shown on television news programs in the 1960s.

If the Commission's definition of indecency were expanded to include all graphic depictions or descriptions of the abortion procedure or of "dead or aborted and bloodied fetuses or fetal tissue," then broadcasters would face even greater uncertainty than they do today about what material might be deemed indecent in the news or entertainment context. Television and radio coverage of many important news stories -- ranging from the Vietnam War, to the assassinations or attempted assassinations of

world and national leaders, to the current turmoil and suffering in Somalia and Bosnia -- has involved depictions and descriptions of blood and death. Similarly, television and radio have depicted or described body organs in their coverage of a number of medical issues, including the AIDS epidemic, birth control, organ transplants and the recent controversy over the federal funding of fetal tissue research. A broadcaster might legitimately be concerned that not only its coverage of abortion, but also its coverage of these other issues, could be subject to challenge under an indecency definition broad enough to cover all of the political advertising at issue here.

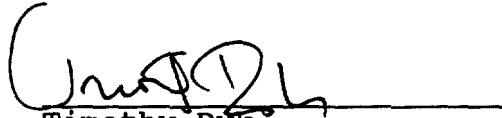
These concerns are particularly valid in view of the unprecedented sanctions that the Commission has recently imposed on allegedly indecent broadcasts. See, e.g., Notice of Apparent Liability to Sagittarius Broadcasting Corp. et al. (Dec. 18, 1992) (\$600,000 fine); Notice of Apparent Liability to Greater Los Angeles Radio, Inc. (Oct. 17, 1992) (\$105,000 fine). The combination of these increasingly severe fines and an increasingly broad definition of indecency could have a significant adverse effect on broadcast speech protected by the First Amendment.

#### CONCLUSION

For the reasons stated above, these parties respectfully request that the Commission not expand its definition of broadcast indecency. As a group, these parties take no position

on whether broadcasters should be allowed editorial discretion under Sections 312(a)(7) and 315(a) to schedule such advertisements during hours that they consider appropriate.

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